1957

Earl D. Tanner v. W. C. Lawler et al : Brief of Respondents

Utah Supreme Court

Earl D. Tanner; Frank E. Moss; D. F. Wilkins; Attorneys for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

EARL D. TANNER,
Plaintiff and Respondent,

—vs.—

W. C. LAWLER and LAURA M. LAWLER, his wife,
Defendant, and Appellants,

—vs.—

WALTER H. REICHERT,
Defendant and Counterclaimant as to Earl D. Tanner, and Plaintiff against George Beckstead as Sheriff of Salt Lake County, Utah, and Appellant,

—vs.—

GEORGE BECKSTEAD, as Sheriff of Salt Lake County, Utah,
Defendant in Intervention, and Respondent.

Case No. 8518

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

There is no dispute as to the facts of this action. The dispute is as to the legal effect of the acts done by the parties. Most of the facts are as set forth in Appellants' Brief, however, respondents desire to direct the

attention of the Court to some facts shown in the record which are either not set forth in Appellants' Brief or are not set forth with sufficient detail.

At the time of the Sheriff's sale of the property involved in this dispute, there were outstanding against said property the following liens, in addition to the mortgage lien being foreclosed:

1. A judgment lien of Paul Clowes resulting from a judgment against W. C. Lawler, dated May 28, 1954, in the amount of $1,555.48.

2. A judgment lien of Idaho Grange Wholesale against W. C. Lawler dated July 13, 1954, in the amount of $441.38.

3. Federal tax lien against W. C. Lawler for the years 1952, 1953, and 1955, in the amount of $1,412.57.

4. A Utah State Tax lien against W. C. Lawler dated January 9, 1954, in the amount of $144.84.

5. A judgment lien of Walter H. Reichert against W. C. Lawler dated May 18, 1955, in the amount of $4,017.20.

The facts set forth in 1, 2, 3 and 4 above are shown in the file in Civil No. 103871, Pacific National Life Assurance Company vs. Magana, et al, which is an exhibit in this case, but the pages of which are unnumbered. The facts in 5 above are shown in Stipulation of Fact No. 23.

In the said case of Pacific National Life Assurance Company vs. Magana, et al, both W. C. Lawler and

Laura M. Lawler were parties defendant and answered concerning their claims to the property being foreclosed, which property was owned by them as joint tenants and mortgaged by both of them to the Pacific National Life Assurance Company. Their Answer was filed January 11, 1955, and was never amended in any particular either before or after the Sheriff's sale. In that Answer neither W. C. Lawler nor Laura M. Lawler made any claim to a homestead interest in the property being foreclosed. (See Answer of the Lawlers in the mortgage foreclosure proceedings.)

It may be well, in the interest of clarity, to chart the significant acts of the parties in the order of their occurrence. Since the principal controversy concerns acts subsequent to the foreclosure proceedings, we will not go behind the foreclosure complaint in point of time:

December 15, 1954: Pacific National Life Assurance Company filed Complaint against W. C. and Laura M. Lawler, et al, foreclosing mortgage.

January 11, 1955: W. C. and Laura M. Lawler answered Complaint — no allegation of homestead.

June 1, 1955: Decree and Order of Sale on Foreclosure entered.

June 3, 1955: Notices of Sheriff's Sale posted and published setting time of sale as 12:00 noon on July 5, 1955.

July 5, 1955: Sheriff's sale. Property purchased by Pacific National Life Assurance Company for the amount of the judgment.

July 6, 1955: Sheriff's Certificate of Sale issued to Pacific National and copy recorded.

December 27, 1955: Declaration of Homestead executed, by W. C. Lawler only (R. 22).

December 28, 1955: 1. Pacific National assigned the Sheriff's Certificate of Sale to Walter H. Reichert for $8,821.91, (R. 23).

2. W. C. Lawler and Walter Reichert advised by John W. Lowe, attorney, that Earl D. Tanner was interested in redeeming the property.

December 29, 1955: (In order of occurrence)

1. W. C. Lawler and Laura M. Lawler quit-claimed property to Walter H. Reichert and Sylvia L. Reichert. Deed specifically includes homestead interest of grantors. (R. 24).

2. Walter H. Reichert exhibits Assignment of Sheriff's Certificate of Sale, Quit-Claim Deed, and Declaration of Homestead to Sheriff.

3. Declaration of Homestead of W. C. Lawler is recorded, as well as the Assignment of Sheriff's Certificate of Sale, and Lawler-Reichert Quit-Claim Deed.

4. Earl D. Tanner, assignee of judgment creditor Paul W. Clowes, took all steps required by statute for redemption and paid Sheriff $9,078.81 for Walter H. Reichert.

5. Sheriff issued Certificate of Redemption to Earl D. Tanner, who recorded same.

6. Earl D. Tanner paid delinquent taxes on property in amount of $424.99.

January 6, 1956: Sheriff's Deed issued to Earl D. Tanner, who recorded same.

For the balance of this brief, the Plaintiff, Earl D. Tanner will be referred to as "Tanner," the Defendant and Intervener Walter H. Reichert will be referred to as "Reichert" and the Defendants W. C. Lawler and Laura M. Lawler as "the Lawlers." George Beckstead will be referred to as "Sheriff" and Pacific National Life Assurance Company as "Pacific National."

STATEMENT OF POINTS

POINT I

WHEN WALTER H. REICHERT PURCHASED AN ASSIGNMENT OF THE CERTIFICATE OF SALE FROM PACIFIC NATIONAL, HE RECEIVED ALL THE TITLE THAT PACIFIC NATIONAL HAD ACQUIRED AS PURCHASER AT THE SHERIFF'S SALE, AND NO MORE, AND HIS LATER ACQUISITION OF A QUIT-CLAIM DEED FROM THE LAWLERS DID NOT TERMINATE THE MORTGAGE FORECLOSURE PROCEEDINGS AND CUT OFF LIEN CREDITORS' RIGHTS OF REDEMPTION.

POINT II

WHEN EARL D. TANNER REDEEMED THE PROPERTY FROM WALTER H. REICHERT HE RECEIVED ALL THE RIGHTS THAT PACIFIC NATIONAL HAD ACQUIRED AS PURCHASER AT THE SHERIFF'S SALE, AND NOTHING MORE, AND THEREFORE HE RECEIVED THE TITLE TO THE PROPERTY FREE FROM HOMESTEAD, BUT SUBJECT TO REDEMPTION BY OTHER LIEN CREDITORS.

POINT III

THE INTEREST OF LAURA M. LAWLER HAVING BEEN SOLD BY THE SHERIFF TO PACIFIC NATIONAL

AT THE MORTGAGE FORECLOSURE SALE, AND EARL D. TANNER HAVING SUCCEEDED TO THE TITLE OF PACIFIC NATIONAL, THE SHERIFF WAS REQUIRED BY LAW TO CONVEY THE INTEREST OF LAURA M. LAWLER TO EARL D. TANNER.

POINT IV

NO CREDITORS HAVING REDEEMED THE PROPERTY FROM THE REDEMPTIONER EARL D. TANNER, HE WAS ENTITLED TO RECEIVE A SHERIFF'S DEED SIX MONTHS AFTER THE SHERIFF'S SALE.

POINT V

THE TRIAL COURT PROPERLY ENTERED A MONEY JUDGMENT AGAINST WALTER H. REICHERT.

POINT VI

THIS COURT SHOULD SUSTAIN THE JUDGMENT BELOW AND, IN ADDITION, DIRECT THAT THE PLAINTIFF BE AWARDED TRIPLE DAMAGES FOR THE PERIOD WALTER H. REICHERT AND THE LAWLERS HAVE CONTINUED TO UNLAWFULLY DETAIN THE PROPERTY SINCE THE JUDGMENT OF RESTITUTION.

STATEMENT OF THE CASE

This is an unlawful detainer action brought by Earl D. Tanner, who claims to be the owner of a certain house and lot, against his tenants at will, W. C. Lawler and Laura M. Lawler, for the possession of the property and for rents and damages. Walter H. Reichert moved to intervene and became a party to the unlawful detainer action as a defendant and counter claimant on the ground that he was the owner of the property, possessing the same through his tenants, the Lawlers (R. 12). Thereafter the said Reichert stipulated that

he was the possessor of the premises by and through the Lawlers and that he refused to surrender the property to said Tanner.

The Trial Court, the Honorable David T. Lewis presiding, decided that the Plaintiff Tanner, was the owner of the property, and that the Defendants Reichert and Lawler were unlawfully detaining the same. He awarded the Plaintiff judgment of restitution, rents up to the time set in the Notice to Quit, and damages thereafter which were, as is required by law, tripled. At the risk of incurring judgment for additional triple damages, the defendant Reichert still refused to surrender the premises and posted a supersedeas bond so that the plaintiff could not enforce his judgment of restitution. Reichert has continued to rent the premises to the Lawlars and to collect rentals from them and the Lawlers, too, enjoying the protection of the supersedeas bond, have refused to vacate the premises.

The issue is whether the detaining of the property by Reichert and the Lawlers is unlawful. The answer lies in the law of titles and in the specific fields of redemptions from mortgage foreclosure sales and of homesteads. If the detainer of the appellants is unlawful, the effect of that unlawful detainer is prescribed by statute and triple damages are mandatory, not permissive.

The basic propositions in the plaintiff's argument are as follows:

1. Pacific National was the purchaser at the Sher-

iff's sale on a mortgage foreclosure and, as such, took the property free and clear of the homestead of the Lawlers.

2. Reichert took an assignment of all the right, title and interest of Pacific National in the Certificate of Sale and, so far as the Sheriff's sale is concerned, stood exactly in the shoes of the Pacific National.

3. Tanner, complying in precise detail with the requirements of the statute, redeemed the property from Reichert. He redeemed by virtue of the judgment lien on the property accruing in an action against W. C. Lawler only.

4. By virtue of this redemption, Tanner stood exactly in the shoes of the purchaser at the Sheriff's sale, Pacific National, having all its right, title and interest in the property, free from homestead.

5. No person has redeemed the property from Tanner and the time for redemption has expired.

6. Tanner, having been substituted to the position of Pacific National by compliance with the redemption statutes, is the owner of the property.

ARGUMENT

POINT I

WHEN WALTER H. REICHERT PURCHASED AN ASSIGNMENT OF THE CERTIFICATE OF SALE FROM PACIFIC NATIONAL, HE RECEIVED ALL THE TITLE THAT PACIFIC NATIONAL HAD ACQUIRED AS PURCHASER AT THE SHERIFF'S SALE, AND NO MORE, AND HIS LATER ACQUISITION OF A QUIT-CLAIM DEED FROM

THE LAWLERS DID NOT TERMINATE THE MORTGAGE FORECLOSURE PROCEEDINGS AND CUT OFF LIEN CREDITORS' RIGHTS OF REDEMPTION.

A discussion of this point requires as background a survey of the law of redemption of real property from mortgage foreclosure sales. Since there was no common law right of redemption after sale, the right is wholly a creature of statute. It should be remembered that there is a right to "redeem" property from mortgage foreclosure by paying off the mortgage *before* the sheriff's sale. That right did exist at common law, and it is mentioned here solely because, in examining the texts on real property and the reported cases, it is necessary to keep in mind that we are concerned with redemption *after sheriff's sale.* The rules and discussions which apply to a "right to redeem" *before* sheriff's sale are different and have no application to the case at bar.

In Utah all rights of redemption arise under, and are limited by, the provisions of Rule 69 (f) U.R.C.P. (formerly § 104-37-30 et seq., U.C.A. 1943). The pertinent portions of that Rule are:

> "(f) *Redemption from Sale.*
>
> (1) Who May Redeem. Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (1) The judgment debtor; (2) a credit having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.
>
> (2) Redemption — How Made. At the time of redemption the person seeking the same may

make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale, or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer: (1) a certified copy of the docket of the judgment under which he claims the right to redeem, or, if he redeems upon a mortgage or other lien, a memorandum of the record thereof certified by the recorder; (2) an assignment, properly acknowledged or proved, where the same is necessary to establish his claim; (3) an affidavit by himself or his agent showing the amount then actually due on the lien.

(3) Time for Redemption, Amount to be Paid. The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 per cent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest on such amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such lien, with interest.

(5) Where no Redemption is Made. If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or his assignee,

> is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, he must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. * * * "

Many states have similar provisions, and the California provisions are almost exactly verbatim to ours. Inasmuch as all the questions raised by appellant have been discussed by the California Courts under their statute, the pertinent portion of it is set forth here:

> "California Code of Civil Procedure; Section 701:
>
> *Redemption; Persons Entitled To; Redemptions Defined.*
>
> Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:
>
> 1. The judgment debtor, or his successor in interest, in the whole or any part of the property;
>
> 2. A creditor having a lien of judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this Chapter termed redemptioners."

It should be noted that both in Utah and California there are two types of redemptions: (1) redemption by the judgment debtor, and (2) redemption by "a creditor having a lien by judgment or mortgage on the property

sold, or some share or part thereof, subsequent to that on which the property was sold." Persons of the second group are called "redemptioners." A careful distinction is necessary between the two types because of the difference in the effect of their redemption.

When a judgment debtor redeems, the effect of the foreclosure sale is *terminated,* and he is restored to his former estate. This may, as in the case at bar, have the disadvantage of restoring judgment liens previously cleared off the property by the foreclosure sale.

When a "redemptioner" redeems, he takes the property subject to redemption from him by the judgment debtor or by other lien or mortgage creditors. The redemtioner takes his title from the "purchaser" at the sheriff's sale and gets no more and no less than the "purchaser" had. (This proposition is in issue and will be substantiated later on.)

The appellant urges that Reichert has, in effect, "redeemed" the property from the sheriff's sale, and, because he later got a deed from the mortgage debtors, the Lawlers, his "redemption" terminates the effect of the sale just as if the judgment debtors had redeemed as provided by statute. If this position were given credence by this Court, grave repercussions would be felt in the law of titles and more problems would arise than would be settled.

The appellants argument overlooks these facts:

1. The steps necessary to effect a redemption are

carefully prescribed by statute, so that everyone may know with certainty when a redemption has occurred.

2. None of the appellants redeemed as provided by statute. The Lawlers never attempted to, and Reichert specifically and intentionally, and on the clear advise of his counsel, *did not redeem.* (See Stipulation 25, R. 65 and 66).

3. There is a great difference, clearly recognized by appellant's counsel at the time he advised Reichert, between an assignment and a redemption, particularly where the judgment debtor or his successor is concerned.

4. The purchaser at a sheriff's sale, or, as in this case, his assignee, may not, by the simple expedient of getting a quit-claim deed from the foreclosed judgment debtor, cut off the statutory rights of lien creditors to redeem.

What happened was this. After the sheriff's sale Reichert had the right to redeem as a judgment lien creditors of the Lawlers, but he was fifth in line, behind Paul Clowes, Idaho Grange Wholesale, the U. S. Government and the State of Utah. The Lawlers, or their assigns, couldn't redeem because if they did they would restore the outstanding liens in the amount of $7,571.47 as first liens on the property, with the mortgage that had been prior to the liens satisfied by the sale and redemption.

If Reichert took an "assignment" of the certificate of sale from Pacific National, the judgment liens

wouldn't be restored on the property—so long as he got the assignment *before* he succeeded to the interest of the Lawlers. So, that is what he did. As Stipulation 25 shows, when he made the arrangement to buy Pacific National's interest, John Lowe, attorney for Pacific National, thought he had in mind redeeming, and prepared the papers accordingly. However, just before the papers were filed, Reichert called Judge Hansen, his attorney, to be sure the papers were in order. Judge Hansen specifically said, "It is the *assignment* we want, Walter, not the *redemption.*" So they started all over again and made out an assignment. Nothing could be clearer than the evidence in this case that Reichert intended *not to redeem.* On the day following the assignment, Reichert solidified his position by purchasing a quit-claim deed from the Lawlers, including their homestead interest, if any they had.

Now, because a subsequent lien creditor exercised his right to redeem the property from Reichert, he (Reichert) seeks to twist his actions into the "equivalent of redemption by the judgment debtor." Apparently the restoration of the judgment liens *in retrospect* appears to be a lesser evil than it did in prospect. Especially since there is no law on whether the judgment liens of other creditors are revived in a situation which is specifically not a *redemption* by the judgment debtor, but is "its equivalent."

The statute terminating the effect of a foreclosure sale in case of redemption by the judgment debtor is silent as to "equivalents." But, when read as a whole,

the statute is eloquently clear. Rule 69 (f) (2) provides that a person redeeming must do four things in addition to paying the correct amount of money:

1. Prepare and serve on the officer or person from whom he seeks to redeem a *notice* that he is redeeming.

2. Serve with his notice a certified copy of the docket of the judgment under which he claims the right to redeem. In case of a judgment debtor like the Lawlers that would be a copy of the docket of the judgment of foreclosure, showing them to be the "judgment debtors," as the term is used in Rule 69 (f) (1) fixing the persons who may redeem. In the case of a judgment lien creditor like Reichert, a certified copy of the docket of the judgment under which he acquired his judgment lien.

3. Serve with his notice a copy of his assignment properly acknowledged and proved. If Reichert had sought to redeem as the assignee of the Lawlers (which he couldn't have done since he didn't get his deed from the Lawlers until the day after his "equivalent of redemption") he would have to furnish this document. If he sought to redeem under his own judgment lien he would not.

4. Serve with his notice an affidavit of himself or his agent showing the amount then actually due on his lien. This would apply only when a person other than the judgment debtor redeemed.

The statute excludes "equivalents of redemption by a judgment debtor" by making so certain and specific the requirements for redemption that there can be *no*

uncertainty as to whether there has been a redemption, and, if so, under whose rights the redemption has been made. *This is so that other lien creditors can tell whether their lien has been restored, or whether they must exercise their right of redemption in order to avoid losing forever their rights to recover on their judgment through the particular property involved.* It is also to protect the judgment debtor, in the event he wants to redeem after someone else has redeemed. Because of the documents which must be prepared and served, he knows exactly from whom he must redeem and what he must pay.

Great havoc would be wreaked in the law of titles if this court were to hold, as appellant requests, that the assignee of the purchaser at the sheriff's sale can, by *thereafter* and within the six month redemption period getting a quit-claim deed from the foreclosed mortgagors, terminate the effect of the foreclosure sale just as if the judgment debtor had redeemed. To so hold would require a holding that the effect was the same whether or not the assignee intended to terminate the sale and restore the prior liens. To so hold in this case would require a holding that it had the effect of terminating the sale and restoring the liens even when the assignee *intended* the transaction *not to have the effect of redemption.* And all purchasers at sheriff's sale, and their assigns and perhaps redemptioners, who later on, but within the six months, have protected their position by purchasing a quit-claim deed from the foreclosed mortgagors, will be held to have involuntarily restored

all the liens of persons who did not redeem. There are many cases where such deeds were obtained out of an abundance of caution.

If this court adopts the position of appellant on this point all titles which have passed through sheriff's sales in the last eight years (or more) will have to be re-examined and many will be thrown into utter confusion.

When Reichert took the assignment from Pacific National, he received the whole title sold by the Sheriff, which was all the right, title and interest of both W. C. and Laura M. Lawler, free from liens, but subject to redemption. When he thereafter obtained a quit-claim deed from the Lawlers, he protected himself from redemption by them and, therefore, from a restoration of the other judgment liens, and that is what he intended to do.

However, because there was included in the deed all the homestead of Lawlers, he claims that, even if he fails on this point, Tanner must pay him an additional $3,650.00 in order for his claimed redemption to be valid. As shown under the next point, that position, too, cannot withstand analysis.

POINT II

WHEN EARL D. TANNER REDEEMED THE PROPERTY FROM WALTER H. REICHERT HE RECEIVED ALL THE RIGHTS THAT PACIFIC NATIONAL HAD ACQUIRED AS PURCHASER AT THE SHERIFF'S SALE, AND NOTHING MORE, AND THEREFORE HE RECEIVED THE TITLE TO THE PROPERTY FREE FROM HOMESTEAD, BUT SUBJECT TO REDEMPTION BY OTHER LIEN CREDITORS.

The discussion under this point, deals with the arguments raised by appellant under his Points 3 and 4. Under those points appellant urges (1) Tanner, if he is to validly redeem from Reichert, must pay him the sum of $3,650.00 in addition to the amount already paid, for the reason that Reichert is the owner of the homestead interest of the Lawlers in this property, and (2) that Tanner has acquired none of the undivided one-half interest of Laura M. Lawler in the property, for the reason that the Clowes judgment, under which Tanner redeemed, was against W. C. Lawler only. These points are joined here because if respondent's argument is sound it disposes of both contentions.

The pertinent facts are these: the deed under which the Lawlers got the property passed title to them as joint tenants, the mortgage to Pacific National was signed by both the Lawlers as mortgagors, the action to foreclose the mortgage was against both the Lawlers, inter alia, and both the Lawlers filed an Answer in the foreclosure suit. The judgment of Paul Clowes under which Tanner redeemed was against W. C. Lawler only and was, therefore, a lien on only his undivided one-half interest. Neither of the Lawlers set up any claim to a homestead in the property in their Answer in the foreclosure suit, and neither of them filed a Declaration of Homestead until December 29, 1955, five months and twenty four days after the property was sold at sheriff's sale.

If Pacific National, the purchaser at the foreclosure sale, took the property free from homestead and if a

redemptioner takes his title from the purchaser at the sheriff's sale, the appellant must fail on both Point 3 and Point 4, because Tanner would have received, by redemption, the title of Pacific National, which was the whole of the title of both Lawlers, free from homestead.

How does one acquire a homestead interest? Prior to 1947, when the cases cited by appellant were decided, there was no statutory method for selecting a homestead and one could select it even after execution sale. On the theory that it is well to have certainty in titles, Judge David T. Lewis, then a legislator, introduced the bill which became Sec. 38-0-10, U. C. A., 1943, and is now Sec. 28-1-10, U. C. A., 1953. As passed, it was entitled "An Act Amending Section 38-0-10, U. C. A., 1943, Relating to Homesteads and Providing for the Selection and Claiming Thereof by Declaration of Homestead Before Execution or Judicial Sale" and provides as follows:

> "28-1-10. Declaration of homestead—Procedure—Delivery and service of—Title of purchaser at sale.—The Homestead must be selected and claimed by the homestead claimant by making, signing and acknowledging a declaration of homestead as provided in section 28-1-11, Utah Code Annotated 1953, which declaration must, before the time stated in the notice of sale on execution, or on other judicial sale, as the time of sale, of premises in which the homestead is claimed, be delivered to and served upon the sheriff or other officer conducting the sale or recorded as provided in section 28-1-12, Utah

> Code Annotated 1953. *If no such claim is filed or served as herein provided, title shall pass to the purchaser at such sale free and clear of all homestead rights.* (Italics added.)

The Constitution of Utah, Article 22, Sec. 1, provides that the Legislature shall provide by law for the selection by each head of a family an exemption of a homestead. The Legislature, following the dictates of the Constitution that it provide for the selection of a homestead, did so. It provided that a man could claim a homestead, free from execution or sale, up to the time his "title" was converted into a "right of redemption", i. e., up to the moment of Sheriff's sale. Plaintiff believes the intention of the Legislature was to remove uncertainty in titles and to set up a method of determining whether any homestead was claimed in a given parcel of land. The Constitution required the Legislature to provide for a selection of a homestead and it is plaintiff's belief that it is self evident that a provision requiring a person to make a written selection of homestead so that all may know whether a homestead is claimed is both constitutional and wise.

The Lawlers did not declare a homestead by the time set for the Sheriff's sale, that is, 12:00 o'clock noon on July 5, 1955, and they have never since had any right to do so. For that reason the property passed to Pacific National free of homestead and thereafter to Reichert free of homestead and to Tanner free of homestead.

Appellants claim that Sec. 28-1-10 is uncertain as

to the time for selection of a homestead. A simple re-reading of the statute shows that a Declaration of Homestead may be made and filed or served at any time up to the hour designated in the Sheriff's Notice of Sale as the hour when the sale is to take place. Nothing could be more clear and certain.

Appellants further claim that for the Lawlers to claim a homestead in the foreclosure proceedings would have been a useless act and therefore they should not be prejudiced by their failure so to do. Unless a mortgagor who is being foreclosed is so gifted as to know, several months in advance of the sale, that his property will not bring, on sheriff's sale, a price greater than the amount of the mortgagee's claim, he cannot possibly tell whether claiming a homestead in his Answer is a useless act. Since trained attorneys are not so gifted, it would be extraordinary to attribute such prescience to the Lawlers.

Since neither of the Lawlers had filed a Declaration of Homestead within the time prescribed by statute, Pacific National received from the Sheriff at the Sheriff's sale, the right, title and interest of the Lawlers, free from homestead. But, the appellant argues, Tanner is not the "purchaser" and does not partake of the benefit of Sec. 28-1-10. The answer is that Tanner stands exactly in the shoes of the "purchaser", having all the purchaser's right, title and interest, and no more or no less.

By operation of law a redemption by a redemptioner

is the equivalent of an assignment of a sheriff's certificate of sale and the redemptioner stands in the shoes of the "purchaser" at sheriff's sale. This rule is so universally adhered to by the courts of states having statutes such as ours as to be beyond questioning. Further, the rule has been specifically adopted in Utah by this Court in *Dupee vs. Salt Lake Valley Loan and Trust Company,* (1899) 20 U. 103, 57 P. 845, 77 Am. St. Rep. 902, as follows:

> "By redeeming, the respondent became, by operation of law, *the assignee of the purchaser and succeeded to his rights and no more.*" (Italics added)

The text writers in discussing redemption as a basis of title state the law as follows:

> *American Law of Property,* Volume 4 Section 18.66 b.:
>
> "Redemption as a Basis of Title:
>
> Redemption from either a ministerial or a judicial sale is a method of satisfying encumbrances when made by an owner, and is a method of transferring title or a prospect of title when made by a junior lienor or by anyone else who is entitled to be subrogated.
>
> *The latter type of redemption effects an assignment of the rights of the original purchaser* and the redemption is within the terms of the recording action to the same extent as though he had taken an express assignment. Validity of the transfer is to be judged by checking the redeeming party's rights under the statute to make redemption, or by ascertaining that the redemptionee has accepted the redemption monies."

The case law on the point is clear, unequivocal and directly in point. It was established prior to 1880 under a statute essentially the same as ours.

The law on this point has been annotated at 135 ALR 196 under an annotation entitled "Creditor or encumbrancer redeeming from mortgage sale as acquiring title and rights of sale purchaser." The Utah case above is referred to as illustrating the following general rule:

> "Under most statutes, a creditor or junior encumbrancer who redeems from a mortgage sale succeeds to the title and rights of the mortgage-sale purchaser."

There is an excellent and complete 1954 annotation covering most of the points in dispute in this law suit in Cal. Jur. 2d, Executions, Sections 200 et seq. The effect of a redemption by a "redemptioner" (by definition a creditor of the mortgage debtor) is set forth in Section 219 thereof as follows:

> "Section 219. *Effect of redemption by creditor of debtor*—When property is redeemed from an execution sale by a redemptioner, the execution sale is not effected, and the redemption operates to transfer the rights of the purchaser at the sale as evidenced by the certificate of sale. When the time for further redemption has expired, the Sheriff's deed is made to the final redemptioner instead of the original purchaser, and he succeeds to the title of the original purchaser at the execution sale."

The Supreme Court of California describes the

effect of such a transaction in *McNutt vs. Nuevo Land Company,* 167 Cal. 459, 140 P. 6, as follows:

> "The so-called redemption by a junior encumbrancer is not in strict logic a redemption, but is rather a purchase of the rights and title acquired by the purchaser at the prior sale."

Applying the law set forth above to this case, we get the following results:

1. Pacific National purchased the property in dispute at Sheriff's sale and received the title of both foreclosed joint tenants, W. C. Lawler and Laura M. Lawler, and by virtue of Sec. 28-1-10, took title free from homestead. As is the case in all judicial sales of real property, the title was subject to redemption.

2. Reichert bought Pacific National's title, took an assignment of the certificate of sale, and stood exactly in Pacific National's shoes.

3. Tanner redeemed and by operation of law received Pacific National's title, through Reichert, just as if Tanner had been a voluntary assignee.

4. Tanner's title is free from homestead.

POINT III

THE INTEREST OF LAURA M. LAWLER HAVING BEEN SOLD BY THE SHERIFF TO PACIFIC NATIONAL AT THE MORTGAGE FORECLOSURE SALE, AND EARL D. TANNER HAVING SUCCEEDED TO THE TITLE OF PACIFIC NATIONAL, THE SHERIFF WAS REQUIRED BY LAW TO CONVEY THE INTEREST OF LAURA M. LAWLER TO EARL D. TANNER.

The Appellants argue that a redemptioner whose right to redeem results from a judgment lien against one of two joint tenants may not, by exercising his right to redeem, obtain any title as against the other co-tenant. This is the gist of their argument under Point Four and the conclusion appellants draw is that, even if Tanner's redemption were valid, he would receive only the title of W. C. Lawler and the undivided one-half interest of Laura M. Lawler would return to her, presumably having reverted from Pacific National or Reichert at the time of Tanner's redemption. This argument was placed before the Supreme Court of California in 1880 under a statute almost exactly like our and was rejected. See *Eldridge* vs. *Wright,* 55 Cal. 531, 6 P. C. L. J. 724 which holds as follows:

> "Where land sold under judgment is embraced in one sale, a redemptioner, having a lien upon a share or part of the land sold, can only redeem by paying the whole of the purchase money or redeeming the whole of the land; and in such cases he succeeds to the whole interest of the purchaser, and accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judgment creditor of one of the tenants, who in due course received the deed, the redemption took the interest of both tenants."

A creditor having a lien on only a part of the property sold, has the right to redeem by statute. Rule 69 (f) (1), U.R.C.P. says that "a creditor having a lien by judgment or mortgage on the property sold, *or some*

share or part thereof" may redeem. California has the same provision.

There have been later cases in California dealing with the subject and the result of those cases is set forth in the annotation at 19 Cal. Jur. 2d referred to above as follows:

> "Properties sold as a single lot or parcel must be redeemed as a whole; it cannot be redeemed piece meal. For example, where the sale is of the interest of all joint owners, the interest of one of the joint owners cannot be redeemed separately from the others; and one who succeeds to a part of the total interest sold must redeem the whole or not at all." (19 Cal. Jur. 2d 640, 641)

> "Section 207.—*Creditor of Co-tenant*—If real property held in joint ownership is sold at execution sale, a creditor having a lien on the undivided interest of one co-tenant may redeem the whole, but has no right to redeem only the undivided interest of his debtor. In case of such redemption, the redemptioner owes no duties to the co-tenants of his debtor, and apparantly, cannot assert any right of contribution as to that."

As can be seen from the above authorities, not only did Tanner receive the whole interest of both W. C. and Laura M. Lawler, but, in addition, it would have been impossible for him to obtain by redemption the undivided interest of either of them. The effect of Tanner's redemption was to pass to him the whole interest of both the Lawler's, free from homestead, but subject to redemption. There was no subsequent redemption.

POINT IV

NO CREDITORS HAVING REDEEMED THE PROPERTY FROM THE REDEMPTIONER EARL D. TANNER, HE WAS ENTITLED TO RECEIVE A SHERIFF'S DEED SIX MONTHS AFTER THE SHERIFF'S SALE.

Point Two of the appellant's brief is devoted to the proposition that the Sheriff was without authority to give a Sheriff's deed to Tanner on January 6, 1956, for the reason that, although six months had expired from the date of the Sheriff's sale, sixty days had not expired from the time of the last redemption. Tanner having redeemed on December 29, 1955. They point out that under respondents' view of the law, a redemptioner may redeem on the last day of the six month period and thus prevent a subsequent redemption, and urge that this would be unfair. That it is not unfair is apparent. Any person who has a right to be a "subsequent redemptioner" has had the full six month period in which to be an "original redemptioner" if he had a bona fide desire to redeem. Any redemptioner may redeem by paying the purchaser at Sheriff's sale his bid price plus 6 percent If he waits for an intervening redemptioner to redeem he must pay the bid price plus 6 percent plus an additional 3 percent and plus the other redemptioner's lien. If he waits the whole six months to redeem it can hardly be called unfair to him that another may redeem on the last day.

Rule 69 (f) (4) provides for subsequent redemptions and states that "any other creditor having a right to redeem may, within sixty days after the last redemp-

tion *and within six months after the sale"* redeem the property from the last redemptioner. This clearly limits subsequent redemptions to a time which is never beyond six months from the date of the sheriff's sale and may be even earlier, since it may also never be more than sixty days after the last redemption.

If this interpretation is sound, it would not matter even if the Sheriff had given Tanner a Sheriff's deed pre-maturely, because the time for subsequent redemptions had expired.

Of overriding significance in relation to this point, however, is the fact that no other creditor has sought to redeem from Tanner either within the six month period or within the six month period plus sixty days. Neither of the appellants have offered or attempted to redeem from Tanner at any time, nor tenderd to him or to the Sheriff for him the documents necessary to redemption or the money necessary to a successive redemption. The time in which such a successive redemption from Tanner could have been made under even the most liberal interpretation having long since passed and no redemption having been attempted or tendered, the question of whether the redemption period expired at the termination of six months or at the termination of sixty days after Tanner's redemption is moot.

POINT V

THE TRIAL COURT PROPERLY ENTERED A MONEY JUDGMENT AGAINST WALTER H. REICHERT.

Point Five of appellant's brief questions the entry

of a money judgment against Walter Reichert, the intervener below. The claim is made that he was not in actual possession of the premises and that he had no notice to quit.

The facts in this regard are before this Court, as they were before the Court below, upon stipulation of all parties, a stipulation presumably setting forth all facts, ultimate as well as evidentiary, that any party expected to rely on in this action. The portions of that stipulation pertinent to this point are Stipulations 19, 20 and 21, (R. 62-3) as follows:

> 19. Since December 29, 1955, the intervener has had possession of the above described premises by and through the defendants, W. C. Lawler and Laura M. Lawler, who claimed and still claim to be the tenants of the intervener, and the intervener refused and refuses to surrender the possession of said premises to the plaintiff.
>
> 20. On or about January 19, 1956, plaintiff gave defendants notice to quit, requiring defendants to vacate the above described premises within seven days from the service of said notice, and had the same served in the manner provided by law.
>
> 21. More than seven days have elapsed since the service of such notice, and the defendants have failed and refused to quit the above described premises and surrender the same to plaintiff.

The stipulation was entered into after Reichert had, upon his own motion become a defendant and raises no questions of service of notice. The defendant, Reich-

ert, apparently intended to rely below on his title and not on any question of notice, and for that reason stipulated that "plaintiff gave defendants notice to quit." Under those circumstances, Reichert should not now be allowed to raise the point.

This action was commenced against the Lawlers only, since the plaintiff was not aware that Reichert was the real party behind their refusal to deliver up his property. On February 4, 1956, the Lawlers answered the Complaint saying (R-10):

> "6. ***these answering defendants allege that they are lawfully in the possession of the premises described in plaintiff's Complaint as tenants of Walter H. Reichert, the owner of such premises."

Thereafter, on February 10, 1956, Reichert asked leave to intervene and become a *party defendant to this unlawful detainer action* on the following grounds, (R-12):

> "That the appellant (Reichert) claims to be the owner and entitled to the possession of the tract of land described in plaintiff's Complaint, subject only to the rights of the Defendants, Lawlers, to the possession thereof as tenants of the applicant."

Permission being granted, Reichert filed his Answer as a defendant and his third party complaint against the Sheriff. When issue was joined all round, the fact was stipulated as set forth above to the effect that Reichert was the person in possession of the prem-

ises and that he was exercising his possession through the Lawlers. (Stipulation 19, R. 62).

The law in this situation is clearly prescribed by Section 78-36-7, U.C.A. 1953 as follows: (Italics added.)

> "78-36-7. Necessary parties defendant.—No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made a party defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; *but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment must be rendered against them.* ***"

As is seen from the above statute, the court having found that Reichert who was "one of the parties appearing in the proceedings" was guilty of unlawful detainer, the court was required by statute to render judgment against him.

What kind of judgment? Section 78-36-10 answers that question in detail, providing that judgment shall be entered for restitution of the premises as well as rent and three times any damages caused by the unlawful detainer. The treble damage provision is mandatory and not permissive, as held by this court in *Forrester* vs. *Cook,* 77 U. 137, 155, 292 P. 206.

It would appear from reading Section 78-36-7 that entry of such a money judgment against Reichert, since

he is a party voluntarily appearing in the action and a party found guilty of unlawful detainer, is also *mandatory*. Any other interpretation would simply be requiring the Court to waste time re-trying the same issues on the same facts in another action.

POINT VI

THIS COURT SHOULD SUSTAIN THE JUDGMENT BELOW AND, IN ADDITION, DIRECT THAT THE PLAINTIFF BE AWARDED TRIPLE DAMAGES FOR THE PERIOD WALTER H. REICHERT AND THE LAWLERS HAVE CONTINUED TO UNLAWFULLY DETAIN THE PROPERTY SINCE THE JUDGMENT OF RESTITUTION.

The trial court found the ultimate facts in favor of the plaintiff (R. 78 and 79) and concluded from those facts (R. 90), among other things, as follows:

> "4. Since January 26, 1956, the defendants, W. C. Lawler, Laura M. Lawler and Walter H. Reichert have unlawfully detained said propery and are now unlawfully detaining the same from the possession of the plaintiff.
>
> 5. Plaintiff is entitled to judgment against the defendants and each of them for unpaid rentals in the amount of $90.00, for damages in the amount of $500.00, being the actual damages of $167.67 trebled, and for his costs and disbursements herein."

The judgment as to damages was based on the finding, pursuant to stipulation, that the fair rental value of the premises is $100.00 per month. This Court has held that the rental value of the premises is the min-

imum of damages for unlawful withholding. *Forrester* vs. *Cook*, supra, point 15 of the decision:

> "While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of possession is the *minimum of damages.*" (Italics added)

On March 26, 1956, in conjunction with his Notice of Appeal, Reichert filed a cost bond in the amount of $300.00, in addition to a "Supersedeas Bond on Appeal" (R. 96), undertaking to stay execution on the trial court's judgment pending the appeal. The bond specifically undertakes to pay "damages for delay" in the event the judgment is affirmed. The amount of the supersedeas bond is $1,000.00 and the plaintiff, in the belief, right or wrong, that the defendant Reichert is a man of substantial means, has made no objection to the amount, on the theory that, regardless of bond, said defendant has the capacity to respond in damages in whatever amount may be awarded in this action.

The filing of the supersedeas bond stays the execution of the money judgment and the judgment of restitution. The court having found, per stipulation, that Reichert was in possession of the premises through the Lawlers, any attempt to oust him by ousting the persons through whom he held possession would, in light of the supersedeas bond, have been tortious.

It follows that, Reichert having elected to retain possession even when adjudged to be in unlawful detainer of the property, he must accept responsibility

for the penalties provided by law. Penalties he could have readily avoided by the simple expedient of surrendering possession to the plaintiff pending the outcome of this appeal.

As noted in *Forrester* vs. *Cook,* supra, the minimum damages for unlawful detainer is the rental value, in this case, $100.00 per month. As further decided in the same case, where there is unlawful detainer, those damages must be tripled. It follows that in the event the judgment for the plaintiff is affirmed, this Court should either assess additional damages at $300.00 per month during the term of the appeal or remand the case to the trial court to fix the same.

CONCLUSION

The judgment below and the within brief are based on these premises, all of which the respondents believe to be sound:

1. When Reichert purchased the assignment of the Certificate of Sale from Pacific National, he obtained title subject to redemption.

2. His later acquisition of a deed from the Lawlers did not revert back and convert his receipt of an "assignment" of the certificate of sale into an involuntary "redemption by the judgment debtor."

3. Reichert having had title subject to redemption and Tanner having redeemed, title is in Tanner.

4. There is no outstanding homestead interest in

Reichert for the reason that neither of the Lawlers had made a timely Declaration of Homestead and therefore they had no homestead to assign to him. Further, the title Tanner took, being the title of the purchaser at the sheriff's sale, was, by operation of law, free and clear of homestead.

5. Since a redemptioner succeeds to the title of the purchaser at the judgment sale, Tanner receivd the title of both Lawlers when he redeemd.

6. Reichert, being guilty of unlawful detainer along with the Lawlers, is subject to a money judgment and triple damages.

For these reasons, respondents pray this Court for a decision affirming the judgment of the trial court and assessing damages against both Reichert and the Lawlers for the period of the appeal at three times the rental value of the property withheld from the plaintiff.

Respectfully submitted,

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